



Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: Nicolet Instrument Corp.

File: B-258569

Date: February 3, 1995

John Shea and Chris Lins for the protester.
John E. Warner for Perkin-Elmer Corp., an interested party.
Barbara Vail, Esq., and Ronald D. Conrad, Department of the Treasury, for the agency.
Christine F. Davis, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A contracting agency reasonably determined that the software data base system component proposed as an alternate product to the specified brand name data base was not acceptable because the protester's data base did not have the additional features present in the brand name data base to satisfy the agency's minimum needs.

DECISION

Nicolet Instrument Corp. protests the award of a contract to Perkin-Elmer Corp. under request for proposals (RFP) No. CS-94-045, issued by the Department of the Treasury, Customs Service, for the acquisition of a fourier transform infrared (FT-IR) spectrometer and microscope system.

We dismiss the protest in part and deny it in part.

The RFP requested proposals for one FT-IR system with an option for a second FT-IR system. The system, used by the Customs Service in enforcing various import, export, and trade laws, employs spectral analysis to identify samples of items retained at customs. The system consists of a spectrometer and microscope; a microcomputer system for controlling, collecting, and processing data; a monitor for visualizing the microscope's image; a video camera for producing this image; and software for operating the system.

Offerors were also required to furnish certain accessories for the FT-IR system, including three spectral software libraries, identified by the brand name manufacturer, "Sadtler." These libraries store spectral data transmitted

by various chemical compounds, textiles, or fibers; the spectral data from these known sources can be matched against the spectral data from unknown sources to facilitate identification. The libraries specified by the RFP were the Sadtler Starter Library, which contains the spectra of a wide variety of chemical compounds; the Sadtler Georgia State Crime Lab Library, which contains the spectra of legal and illegal drugs; and the Sadtler Fibers and Textile Chemicals Library, which contains the spectra of natural and synthetic fibers. The RFP required the FT-IR system to possess operating software capable of searching the specified Sadtler libraries.

Aside from the requirement for the brand name Sadtler libraries and for an FT-IR software search package compatible with these libraries, the RFP Statement of Work (SOW) primarily set forth performance-based specifications. The RFP provided that an offeror's proposed FT-IR system and accessories must meet all of the specifications set forth in the SOW to be considered technically acceptable. However, the RFP also allowed offerors to submit alternate proposals involving some material deviation from the specifications, provided the stated objectives of the RFP would be met. Award was to be based upon a best value evaluation scheme.

Four offerors, including the protester and the awardee, submitted proposals by the May 6, 1994, proposal receipt date. Nicolet also submitted an alternate proposal (Proposal #2), which offered a higher-priced microscope than did its primary proposal (Proposal #1). In both proposals, Nicolet stated that it was unable to acquire the brand name Sadtler libraries because it was a direct competitor of Sadtler. Accordingly, in lieu of the specified Sadtler libraries, the protester proposed its own libraries and search software compatible with those libraries, i.e., Nicolet's Starter Library, Georgia State Crime Lab Library, Synthetic Fibers Library, and Spectral Search Software. The protester stated that, if the agency found Nicolet's spectral library package unacceptable, the agency should purchase the Sadtler package directly from the brand name manufacturer.

A Technical Evaluation Panel (TEP) judged all initial proposals as susceptible to being made acceptable, and discussion questions were drafted addressing the evaluated deficiencies in each proposal. On June 17, the Customs Service transmitted each offeror's discussion questions and requested best and final offer (BAFO) revisions by June 24. In Nicolet's discussion questions, the Customs Service advised that the RFP required Sadtler spectral libraries and Sadtler searching capabilities. The agency asked Nicolet to show the comparability of its alternate products in more detail.

In its BAFOs, the protester furnished additional information in an effort to establish the comparability of its proposed alternate libraries. One of these libraries, Nicolet's Synthetic Fibers Library, was proposed as an alternative to Sadtler's Fiber and Textile Chemicals Library. While Nicolet's proposal acknowledges that the specified Sadtler Library contains the spectra of both natural and synthetic fibers, Nicolet's literature did not state that its proposed Synthetic Fibers Library contained the spectra of any natural fibers.¹ The protester also did not state whether its proposed Nicolet search software was compatible with Sadtler's fiber and textile data base. The protester repeated that, if its proposed alternative products were unacceptable, the agency should purchase the specified Sadtler products directly from the manufacturer.

Following the TEP's evaluation of BAFOs, the agency determined that only Perkin-Elmer had submitted a technically acceptable proposal. The agency found that the remaining offerors, including Nicolet, had failed to correct deficiencies and their BAFOs were deemed technically unacceptable. With respect to Nicolet's BAFOs, the agency found that the protester's proposed Synthetic Fibers Library and corresponding search software did not contain a spectral data base comparable to that of the specified Sadtler products, in that it omitted the spectra of any natural fibers. The Customs Service considered the ability to analyze these fibers necessary to meet its minimum needs, and accordingly, found the protester's alternate library package technically unacceptable.²

Although only Perkin-Elmer's proposal was considered technically acceptable, the agency confirmed its selection decision by performing a cost/technical tradeoff pursuant to the RFP "best value" evaluation scheme, based on the assumption that Nicolet's proposals could be considered technically acceptable. The agency noted that Perkin-Elmer submitted the highest-rated technical proposal, earning

¹Nicolet's technical literature also did not state whether its alternative data base contained the spectra of any textile chemicals, e.g., finishers and softeners, although the protester's proposal acknowledged that the Sadtler data base contained these spectra.

²The agency's source selection statement also noted that Nicolet's Proposal #1 failed to offer a microscope with multiple magnification capability, as required by the RFP. In response to Nicolet's protest, the Customs Service concedes that it erroneously evaluated Nicolet's proposal in this regard.

82 of the available 100 points,³ while Nicolet submitted the second- and third-highest rated technical proposals, with 74 points for Proposal #2 and 73 points for Proposal #1.⁴ The agency considered the margin of difference between the awardee's and protester's proposals to be "technically quite significant."

As for price, Perkin-Elmer's total evaluated price was \$231,042,⁵ while Nicolet's total evaluated price was \$234,295 for Proposal #1 and \$264,803 for Proposal #2. Both of the Nicolet prices reflect an upward adjustment of \$4,744, which was the agency's estimated cost of purchasing the Sadtler software necessary to make the protester's proposal technically acceptable.⁶ Thus, if the agency purchased the additional software necessary to make the protester's proposals technically acceptable, the awardee's proposal would be more advantageous than the protester's from both a technical and price standpoint.

³Under the source selection plan for this procurement, a proposal earned points only if the offered part or accessory exceeded the applicable technical specifications; if the part or accessory did not exceed the specifications, regardless of whether it was technically acceptable or unacceptable, the proposal earned no points.

⁴The protester's score for Proposal #1 should actually have been 73.5 points because, as noted above in footnote 2, the agency miscalculated the magnification capability of Nicolet's proposed microscope, resulting in a slight reduction of the protester's overall score.

⁵The awardee's evaluated price was \$5,200 less than its proposed price because, consistent with the RFP specifications, the awardee proposed a dual-purpose printer, which combined the capabilities of another required instrument, as well as a single-purpose printer, which lacked those additional capabilities. Because the dual-purpose printer was sufficient to satisfy its needs, the agency subtracted the price of the unnecessary single-purpose printer from Perkin-Elmer's total proposed price.

⁶The protester estimates that the software only costs \$4,010. Even if this estimate were substituted for the agency's, the awardee's evaluated price would still be lower than the protester's prices.

Accordingly, the agency determined to make award to Perkin-Elmer. After a debriefing, this protest was filed.⁷

Nicolet protests that the RFP unreasonably restricts competition by specifying the brand name Sadtler libraries. This protest allegation is untimely. Under the Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1994), an offeror must protest before the proposal receipt date any apparent solicitation impropriety. Because the brand name requirement was evident prior to the initial proposal receipt date, it was incumbent upon Nicolet to file its protest of this matter before proposals were due. Consequently, we will not consider the protester's untimely post-award challenge to the RFP specifications. See Wallace Coast Mach. Co., B-235608, Sept. 15, 1989, 89-2 CPD ¶ 234.

Nicolet also disputes the agency's determination that its proposed alternate libraries were unacceptable, claiming that its "library offerings are nearly exact alternates" to the specified Sadtler products.

The contracting agency has the primary responsibility for determining its minimum needs and evaluating whether an offered item will satisfy those needs, since it best understands the conditions under which the supplies and services will be used and bears the burden of any difficulties incurred by reason of a defective evaluation. Dynalco Corp., B-248142, Aug. 3, 1992, 92-2 CPD ¶ 68; Fiber Materials, Inc., B-248337, Mar. 18, 1992, 92-1 CPD ¶ 288. An offeror must affirmatively demonstrate the acceptability of an alternate product; we will not disturb the agency's technical determination in this regard unless it is shown to be unreasonable. Id.

⁷In its protest letter, Nicolet raised numerous protest allegations based upon information obtained at the debriefing. The agency responded in detail to all allegations in its protest report. Nicolet failed to respond to the agency's position on several matters, *i.e.*, whether the agency provided meaningful discussions with respect to Nicolet's proposed video camera; and whether the agency properly evaluated the dot pitch of Nicolet's proposed monitor, the spectral range of the proposed microscopic detector and optical bench equipment, the abscissa accuracy of the proposed spectrometer, and the design of the Proposal #1 microscope. Accordingly, we view these issues as abandoned and will not consider them further. See Monfort, Inc., B-256706, July 5, 1994, 94-2 CPD ¶ 2.

We find that the Customs Service reasonably determined that Nicolet did not propose an acceptable alternative to the specified Sadtler software. The technical literature accompanying the protester's BAFO does not demonstrate that Nicolet's Synthetic Fibers Library includes the spectra of any natural fibers, as does the specified Sadtler Library. Similarly, Nicolet's search software, which is compatible with its Synthetic Fibers Library, was not stated to be capable of searching the enhanced data base of the Sadtler Library. Nicolet has not asserted that the agency's findings in this regard were erroneous or that its software does, in fact, possess a natural fiber data base and natural fiber searching capabilities. In our view, the Customs Service reasonably concluded that Nicolet's software does not provide for a spectral analysis of natural fiber samples and therefore will not meet the agency's minimum needs.

Nicolet also protests that the Customs Service did not specify what information the protester needed to supply to establish the acceptability of its alternate software. While agencies generally must advise competitive range offerors of deficiencies in their proposals to afford them the opportunity to satisfy the government's requirements, this does not require the agency to identify the information or data an offeror should produce to establish the acceptability of its proposal. Elma Eng'g, 70 Comp. Gen. 81 (1990), 90-2 CPD ¶ 390. Rather, the agency should impart sufficient information to afford the offeror a fair and reasonable opportunity to identify and correct deficiencies in its proposal. Id.; Eagan, McAllister Assocs., Inc., B-231983, Oct. 28, 1988, 88-2 CPD ¶ 405. The Customs Service satisfied this obligation by asking Nicolet during discussions to show the comparability of its proposed libraries in more detail and by allowing Nicolet the opportunity to revise its proposal. See Elma Eng'g, supra. In any event, the record in this case reflects that Nicolet already knew that the specified Sadtler libraries contained the spectra of natural fibers, while its own did not; thus, we fail to see how greater specificity during discussions would have assisted the protester.

As noted above, the Customs Service considered the alternative of purchasing the Sadtler software necessary to make the protester's proposal technically acceptable, but reasonably determined that the effect of doing so would have been to increase Nicolet's evaluated price above that of the awardee's. At the same time under the evaluation scheme employed here, Nicolet would have earned no additional technical points for meeting, but not exceeding, the brand name specifications, and its technical

score would have remained well below the awardee's.⁸ Because the protester's proposal, as supplemented with the Sadtler software, would have been less desirable than the awardee's both from a price and technical standpoint, the agency reasonably confirmed that award should be made to Perkin-Elmer, consistent with the RFP best value evaluation scheme.⁹ We have no basis to question this determination.

The protest is denied.

Ronald Berger
for Robert P. Murphy
General Counsel

⁸In a related vein, we find that the protester was not prejudiced by the TEP's allegedly improper determination that the scan speed of Nicolet's spectrometer did not meet the specifications. This resulted in a score of "0" points for this element. Assuming that Nicolet is correct that its proposed scan speed does meet the specifications, Nicolet still would have earned "0" points for this element under the evaluation plan employed, inasmuch as Nicolet does not allege that the proposed scan speed exceeds the specification requirements. We also note that the evaluated scan speed deficiency does not appear in the agency's source selection statement as a basis for finding the protester's proposal unacceptable.

⁹In its comments to the agency report, filed November 15, 1994, Nicolet protested that Perkin-Elmer's technical proposal was overrated in relation to the protester's proposal. However, Nicolet discovered these protest grounds more than 10 days before filing its comments from sources other than the agency report. For example, on October 10, Nicolet received protest correspondence from Perkin-Elmer detailing certain features of the awardee's proposal and did not protest the agency's evaluation of these features within 10 days of receiving the information, as required by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2). Accordingly, we decline to question the offerors' relative technical scores based upon the untimely protest allegations.